IN THE SUPREME COURT OF THE STATE OF MONTANA

No. _____

IN RE THE PETITION AND MEMORANDUM IN SUPPORT OF REVISION OF RULES OF PROFESSIONAL CONDUCT ON ADVERTISING

PETITION

The Trustees of the State Bar of Montana and the Ethics Committee ("Petitioners") respectfully petition this Court to revise and amend three Rules of Professional Conduct that address attorney advertising and solicitation in Montana. The proposed amendments 1) clarify Montana disciplinary jurisdiction over attorney advertising; 2) specifically identify types of misleading lawyer communications; and 3) recognize that Montana does not have a procedure to "qualify" a lawyer referral service.

This petition is filed pursuant to the provisions of Section VI, Montana Supreme Court Internal Operating Rules (2006). The proposed revised rules are attached as Exhibit A in the Appendix. A clean version of the proposed rules is attached as Exhibit B in the Appendix.

MEMORANDUM IN SUPPORT OF PETITION

I. REVIEW OF THE ADVERTISING RULES, INITIATED BY JUSTICE LEAPHART, RESULTED IN THE STATE BAR BOARD OF TRUSTEES' APPROVAL OF THREE PROPOSED AMENDMENTS TO THE MONTANA RULES OF PROFESSIONAL CONDUCT.

In September 2005, Justice Leaphart wrote to the Chair of the Ethics Committee of the State Bar of Montana, Michael Alterowitz, expressing concerns about attorney advertising in Montana:

> It has come to the attention of the Court that there may be some attorney advertising over the internet and/or television in which the source of the advertising funding is not disclosed nor is the fact that cases will be referred to firms other than the firm appearing in the advertisement.
>
> The Court would like the Ethics Committee to look into this and determine whether it is a concern in Montana and, if so, what, if any, amendment to the Rules of Professional Conduct would be appropriate. For reference purposes only, I am enclosing a copy of the recent rule amendments adopted by the Supreme Court of Missouri to address similar concerns.

A. A Panel Was Convened to Examine the Issues and Develop Proposals.

Members of the Ethics Committee, Board of Trustees, former leadership of the Bar and the Executive Director of the Montana Trial Lawyers met in 2006 to examine the issue.[1] Jay Westermeier, a nationally

[1] Participants included then-Ethics Committee Chair Cynthia Smith (also current Bar President; at the time of the meeting, Board of Trustee chair), current Ethics Committee Chair Mike Alterowitz and former Chair Keith Maristuen (also former State Bar President); Ethics Committee members Ted Hess-Homeier, Kent Kasting (also former President of the Utah State Bar), and Tim Strauch (also former Discipline Counsel);

recognized expert on computer law, information technology, licensing and electronic commerce also participated in the meeting. Mr. Westermeier provided a comprehensive overview of how other states are addressing the myriad issues presented with advertising, internet, technology and multi-jurisdictional practice issues. Justice Leaphart's inquiry also presented issues involving confidentiality, conflicts, record keeping, labeling, content restrictions, choice of law, information security, objective consent and unauthorized practice.

Mr. Westermeier emphasized that the group assembled could not "put a Montana boundary on the internet." The objective, he said, was to develop rules that 1) adapt to technological developments; 2) avoid constitutional challenges and 3) avoid anti-trust complaints. He stated that other State Bars' attempts to accomplish these objectives, including rules adopted by the State Bars of Texas, Florida, Louisiana, New Jersey and New York, have run afoul of the Federal Trade Commission with their advertising rules. The amendments adopted by the Supreme Court of Missouri have not.

A working group[2] was assigned to develop proposed language to

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Former State Bar Presidents Robert Sullivan and Andy Suenram; then-Board of Trustee member Robert Spoja; Roberta Zenker, member of the Supreme Court's Unauthorized Practice Commission and former Madison County Attorney and Montana Trial Lawyer Association Executive Director Al Smith.

[2] The working group consisted of Cynthia Smith, Keith Maristuen, Tim Strauch, Andrew Suenram and Robert Spoja.

address the Court's concerns within constitutional and anti-trust perimeters. The full Ethics Committee considered the proposals and voted unanimously to submit the proposed amendments to the State Bar Board of Trustees for its consideration. The proposals were initially submitted to the Board of Trustees in December 2007, at which time the Trustees requested additional information. The proposals were included on each Board agenda in 2008, but postponements resulted in final Board action in September 2008 at the State Bar's Annual Meeting in Butte.

B. The Three Proposed Amendments 1) Clarify Montana's Jurisdiction Over Advertisement and Solicitation; 2) Refine and Provide Examples of Misleading Communication; and 3) Bring Montana's Lawyer Referral Provision Into Line With Current Montana Resources.

1. The first proposed amendment establishes Montana disciplinary jurisdiction over attorneys who advertise, solicit or offer legal services in Montana.

Rule 8.5 of the Rules of Professional Conduct is titled "Jurisdiction and Certification." The proposed amendment, interlineated, reads:

> A lawyer who is not an active member in good standing of the State Bar of Montana and who seeks to practice in any state or federal court located in this State pro hac vice, by motion, or before being otherwise admitted to the practice of law in this State, shall, prior to engaging in the practice of law in this State, certify in writing and under oath to this Court that, except as to Rules 6.1 through 6.4 [the Rules on Public Service and Pro Bono], he or she will be bound by these Rules of Professional Conduct in his or her practice of law in this State and will be subject to the disciplinary authority of this State. A copy of said certification shall be mailed, contemporaneously, to the business offices of the State Bar of Montana in Helena, Montana.

A lawyer not admitted to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that: (1) involves the practice of law in this State by that lawyer; or (2) involves that lawyer holding himself or herself out as practicing law in this State; ~~or~~ (3) advertises, solicits or offers legal services in this State; or (4) involves the practice of law in this State by another lawyer over whom this lawyer has the obligation of supervision or control.

2. The second proposed amendment identifies with specificity what constitutes misleading lawyer communication.

Rule 7.1 is titled "Communications Concerning a Lawyer's Services." The proposed amendments to the relatively short current Rule include eleven specific categories of misleading communications:

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false ~~or misleading~~ if it contains a material misrepresentation of fact or law. ~~,~~ A misleading communication includes, but is not limited to those that (a) omits a fact as a result of which ~~necessary to make~~ the statement considered as a whole ~~not~~ is materially misleading; ~~.~~
(b) is likely to create an unjustified expectation about results the lawyer can achieve;
(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;
(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;
(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;
(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such

fact;
(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;
(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;
(j) provides an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or
(k) states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

This language adopts in large part Missouri's Rule 7.1, excepting the Missouri's Rules on advertising and solicitation, which contain additional regulatory mandates within Rule 7.2 [Advertising] and Rule 7.3 [Direct Contact with Prospective Clients] that are not included in the State Bar's proposal. The State Bar specifically chose to limit the regulatory mandates to those in this Petition, believing its recommendations address the challenges presented in Justice Leaphart's letter. For comparison purposes, the Missouri Rules and the Missouri Supreme Court's comments are attached as Exhibit C.

3. By eliminating language, the third proposed amendment recognizes that Montana does not have a procedure to "qualify" a lawyer referral service.

A number of more densely populated states have *for-profit* "qualified lawyer referral services" that are managed by businesses, churches and other entities. The State Bar of Montana has no resources to develop a

qualification procedure and oversight mechanism for for-profit entities, nor does it want current Rule language to be misread to require it to accept another state's qualification of a for-profit lawyer referral system.

The State Bar currently operates its own *not-for-profit* Lawyer Referral and Information Service (LRIS). The State Bar's LRIS responds to more than 5,500 calls from clients a year. Approximately 100 lawyers are available for referrals. Attorneys on the State Bar's referral service must be active members of the State Bar of Montana and carry malpractice liability insurance. This referral service is free to attorneys in their first year of practice, $125 for attorneys in practice for less than five years and $225 for those in practice longer than five years. Most State Bars charge a percentage of the fee earned by the attorney for the referral. Montana State Bar does not take a percentage of the fee earned, reasoning that to do so would have a dampening effect on attorney participation. Also, profits typically do not exceed the increased costs of administering such a system (as experienced by the State Bar when it previously used the percentage system).

The State Bar proposes to eliminate from current Rule 7.2, titled "Advertising," the language incorporating qualified lawyer referral services. The Montana Rule 7.2 currently is not identical to the ABA's Model Rule[3],

[3] The language not adopted from ABA Model Rule 7.2 (b), and hence not included in

which allows other referral fees in certain situations. The State Bar proposal intends to clearly establish that for-profit referral fees are simply not permitted:

> (a) Subject to the requirements of Rules 7.1 [Communication Concerning a Lawyer's Services] and 7.3 [Direct Contact with Prospective Clients], a lawyer may advertise services through written, recorded or electronic communication, including public media.
> (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a legal service plan or a not-for-profit ~~or qualified~~ lawyer referral service. ~~A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority~~; and (3) pay for a law practice in accordance with Rule 1.19 [Sale of a Law Practice].
> (c) Any communication made pursuant to his rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

II. THIS COURT HAS AUTHORITY TO REVISE THE RULES OF PROFESSIONAL CONDUCT.

The current Rules of Professional Conduct were amended by this Court in February 2004, citing Article VII, Section 2(3) of the 1972 Montana Constitution giving the Supreme Court the authority to make rules governing "admission to the bar and the conduct of the members." In Re: Revising the Montana Rules of Professional Conduct, No. 03-264. The Rules of

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Montana's Rule, provides: "(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement."

Professional Conduct are the core of attorney regulation and fall squarely within the purposes described in the Court's Order unifying the Bar:

> The purposes of the Unified Bar of Montana shall be to aid the courts in maintaining and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar; to encourage the formation, maintenance and activities of local bar associations; to provide a forum for the discussion of and effective action concerning subjects pertaining to the practice of law, the science and jurisprudence and law reform and relations of the bar to the public; and to ensure that the responsibilities of the legal profession to the public are more effectively discharged.

In the Matter of the Unification of the Bar of the State of Montana, No. 12616 (1974).

III. THE PROPOSED AMENDMENTS ARE CONSTITUTIONAL.

Most lawyer advertising and solicitation is commercial speech, and as such, it generally receives an intermediate level of First Amendment protection. Advertising and solicitation can not be prohibited, but reasonable restrictions may be imposed by the state.

The U.S. Supreme Court case holding that commercial speech is entitled to some protection is Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976). In that case, the Court analyzed a statute that prohibited pharmacists from advertising the prices of prescription drugs and concluded that the state could not completely suppress

dissemination of such information. Because of differences between commercial speech and traditionally protected political speech, the Court found that a lesser degree of protection is adequate to ensure the free flow of commercial information. 425 U.S. at 771, n. 24. Accordingly, commercial speech is entitled to an intermediate level of protection that falls between wholly unprotected speech, such as untruthful statements, and completely protected political speech. The Court stated that commercial speech may be regulated by time, place and manner restrictions not based on content, restrictions against false or misleading speech, and prohibitions against speech that proposes an illegal transaction. 425 U.S. at 771-772.

The Supreme Court extended this newly articulated commercial speech doctrine to protect lawyers' truthful print advertising in Bates v. Arizona State Bar, 433 U.S. 350 (1977). Bates held that a blanket ban on advertising of routine legal services is unconstitutional.

Later, outside the context of lawyers' speech, in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), the Supreme Court provided a standard for regulating commercial speech. The test has four parts: (1) the expression regulated must propose a lawful activity and not be misleading; (2) a substantial governmental interest must be at stake; (3) the regulation must directly advance the substantial

governmental interest; and (4) the regulation must be no more extensive than is necessary to serve that interest. 447 U.S. at 566.

The Supreme Court has employed the Central Hudson test several times in cases involving various provisions of state codes or rules regulating attorney advertising and solicitation. In In re R.M.J., 455 U.S. 191 (1982), the Court reversed Missouri's discipline of a lawyer for publishing print advertisements that, although truthful, departed from a menu of permissible content in Missouri's Code of Professional Responsibility. In Florida Bar v. Went For It Inc., 515 U.S. 618 (1995), the Court found that protecting the privacy of grieving accident victims' families is a legitimate state interest. Accordingly, it upheld a restriction that prohibited plaintiffs' personal injury lawyers from sending letters to accident or disaster victims or their families within 30 days after the accident or disaster.

As a result of decades of litigation over regulation of lawyers' marketing activities, several propositions have become settled:

- A state may ban false or misleading advertising, as well as advertising that promotes or advocates illegal activity. Bates v. Arizona State Bar, 433 U.S. 350, 384 (1977); California v. Morse, 25 Cal. Rptr. 2d 816 (Cal. Ct. App. 1993); Gould v. Harkness, 470 F. Supp. 2d 1357 (S.D. Fla. 2006); In re Keller, 792 N.E. 2d 865 (Ind. 2003).

- A state may to some extent restrict the time, place and manner of lawyer's advertising and solicitation. Bates v. Arizona State Bar, 433 U.S. 350, 384 (1997); Florida Bar v. Went For It Inc., 515 U.S. 618 (1995).
- Reasonable warnings or disclaimers or other prescribed content may be mandated to dissipate the possibility of consumer confusion or deception. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 652-653 (1985); Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988); Mason v. Florida Bar, 208 F. 3d 952 (11th Cir. 2000).
- A state may place reasonable restrictions on lawyer advertising and solicitation that is intrusive or overbearing. Bates v. Arizona State Bar, 433 U.S. 350, 384 (1997); Ohralik v. Ohio State Bar Association, 436 U.S. 447, 464 (1978); Florida Bar v. Went For It Inc., 515 U.S. 618 (1995); Chambers v. Stengel, 256 F. 3d 397 (6th Cir. 2001).

A review of the State Bar's current proposals establishes that constitutional boundaries have been observed. To protect consumers from confusion or deception (a lawful government interest), eleven categories identifying specific misleading communications are proposed to be added to Montana's Rule of Professional Conduct 7.1. The proposed amendments to the Rule advance a government interest and are no more extensive than necessary to serve that government interest in consumer protection.

IV. THE PROPOSED AMENDMENTS ARE INCLUDED WITHIN THE "STATE ACTION" EXEMPTION TO THE ANTI-TRUST ACT AND HENCE DO NOT VIOLATE ANTI-TRUST LAWS.

The Sherman Antitrust Act, 15 U.S.C. 1, et seq., is designed to preserve full and free competition and to penalize practices that unreasonably restrain those who seek to compete. To this end, Section 1 declares illegal every contract, combination, or conspiracy in restraint of interstate trade or commerce, while Section 2 prohibits monopolies or attempts to monopolize.

Certain State Bar activities are deemed exempt from anti-trust law by virtue of a judicially created exemption known as the "state action" doctrine. In Parker v. Brown, 317 U.S. 341 (1943), the Court ruled that there was no intent in the Sherman Act to nullify state power. The Court ruled that the exercise of regulatory power by the states, even though it might result in anticompetitive activity, does not violate the Act. To fall within the protection of the state action doctrine, there must be a clearly articulated state policy to replace competition with regulation and there must be state supervision of the anticompetitive conduct. Southern Motor Carriers Rate Conference Inc. v. United States, 471 U.S. 48 (1985) and Brown v. Ticor Title Insurance Co., 982 F.2d 386 (9th Cir. 1992).

The proposed amendments establish the boundaries of lawyer advertising by identifying types of misleading communications. While the

proposed amendment arguably impairs competition, legitimate state policy allows this Court to protect consumers within Montana's attorney regulatory scheme. The proposed amendment to Rule 8.5 subjects lawyers who advertise in Montana to this Court's supervision and disciplinary authority. The "state action" doctrine defeats any anti-trust challenges to the State Bar's proposed amendments[4].

V. CONCLUSION

One need only watch an evening of television to see the extent to which out-of-state providers of legal services attempt to offer representation to Montanans. Most of the advertisements include specific state disclaimers. Adding Montana protections to those advertisements is a sensible alternative. The Petitioners believe that amendments to the Rules of Professional Conduct are necessary to make the Rules clearer and more useful to clients, attorneys and the public. The Board of Trustees of the State Bar of Montana and the Ethics Committee request the Court adopt the proposed changes.

Petitioners request that the Court provide a period of comment before taking action on this petition. We request that the Court direct publication of

[4] See also Bates v. Arizona State Bar, 433 U.S. 350, holding the Antitrust Act inapplicable under the state action doctrine: "the challenged restraint is the affirmative command of the Arizona Supreme Court....That Court is the ultimate body wielding the State's power over the practice of law..., and, thus, the restraint is 'compelled by direction of the State acting as a sovereign" quoting Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

this petition and the proposed rule changes in *The Montana Lawyer* and on the State Bar's website and solicit comments or responses from the Bar membership and public before considering the request for amendment. Petitioners request that they be given the opportunity to reply to comments or responses from the public and the bar.

Respectfully submitted this 25th day of November, 2009.

STATE BAR OF MONTANA

By: _____
Cynthia K. Smith, President

ETHICS COMMITTEE

By: _____
Michael Alterowitz, Chair

Exhibit A

Rule 7.1 Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false ~~or misleading~~ if it contains a material misrepresentation of fact or law. ~~,~~ A misleading communication includes, but is not limited to those that

(a) omit~~s~~ a fact as a result of which ~~necessary to make~~ the statement considered as a whole ~~not~~ is materially misleading; ~~,~~

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;

(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;

(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;

(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payments has been made for the testimonial or endorsement;

(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;

(j) provides an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or

(k) states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 [Communication Concerning a Lawyer's Services] and 7.3 [Direct Contact with Prospective Clients], a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a legal service plan or a not-for-profit ~~or qualified~~ lawyer referral service. ~~A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority~~; and (3) pay for a law practice in accordance with Rule 1.19 [Sale of a Law Practice].
(c) Any communication made pursuant to his rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 8.5 Jurisdiction and Certification.

A lawyer who is not an active member in good standing of the State Bar of Montana and who seeks to practice in any state or federal court located in this State pro hac vice, by motion, or before being otherwise admitted to the practice of law in this State, shall, prior to engaging in the practice of law in this State, certify in writing and under oath to this Court that, except as to Rules 6.1 through 6.4 [the Rules on Public Service and Pro Bono], he or she will be bound by these Rules of Professional Conduct in his or her practice of law in this State and will be subject to the disciplinary authority of this State. A copy of said certification shall be mailed, contemporaneously, to the business offices of the State Bar of Montana in Helena, Montana.

A lawyer not admitted to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that: (1) involves the practice of law in this State by that lawyer; or (2) involves that lawyer holding himself or herself out as practicing law in this State; ~~or~~ (3) advertises, solicits or offers legal services in this State; or (4) involves the practice of law in this State by another lawyer over whom this lawyer has the obligation of supervision or control.

Exhibit B

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(b) is likely to create an unjustified expectation about results the lawyer can achieve;
(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;
(d) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
(e) compares the quality of a lawyer's or a law firm's services with other lawyers' services, unless the comparison can be factually substantiated;
(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;
(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;
(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payments has been made for the testimonial or endorsement;
(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;
(j) provides an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or
(k) states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

Rule 7.2 Advertising

(a) Subject to the requirements of Rules 7.1 [Communication Concerning a Lawyer's Services] and 7.3 [Direct Contact with Prospective Clients], a lawyer may advertise services through written, recorded or electronic communication, including public media.
(b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a legal service plan or a not-for-profit lawyer referral service; and (3) pay for a law practice in accordance with Rule 1.19 [Sale of a Law Practice].
(c) Any communication made pursuant to his rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

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A lawyer not admitted to practice in this State is subject to the disciplinary authority of this State for conduct that constitutes a violation of these Rules and that: (1) involves the practice of law in this State by that lawyer; or (2) involves that lawyer holding himself or herself out as practicing law in this State; (3) advertises, solicits or offers legal services in this State; or (4) involves the practice of law in this State by another lawyer over whom this lawyer has the obligation of supervision or control.

Order dated September 19, 2005, re: Rules 4-7.1 Communication Concerning a Lawyer's Services, 4-7.2 Advertising and 4-7.3 Direct Contact with Prospective Clients

SUPREME COURT OF MISSOURI

en banc

September 19, 2005
Effective January 1, 2006

In re:
Repeal of subdivision 4-7.1, entitled "Communication Concerning a Lawyer's Services," and the comment, code comparison and supplemental Missouri comment thereto; subdivision 4-7.2, entitled "Advertising," and the comment and supplemental Missouri comment thereto; and subdivision 4-7.3, entitled "Direct Contact with Prospective Clients," and the comment, code comparison, and supplemental Missouri comment thereto, of Rule 4, entitled "Rules of Professional Conduct," and in lieu thereof adoption of a new subdivision 4-7.1, entitled "Communication Concerning a Lawyer's Services," and a new comment, code comparison and supplemental Missouri comment thereto; a new subdivision 4-7.2, entitled "Advertising," and a new comment and supplemental Missouri comment thereto; and a new subdivision 4-7.3, entitled "Direct Contact with Prospective Clients," and a new comment, code comparison, and supplemental Missouri comment thereto.

ORDER

1. It is ordered that effective January 1, 2006, subdivision 4-7.1 and the comment, code comparison and supplemental Missouri comment thereto; subdivision 4-7 and the comment and supplemental Missouri comment thereto; and subdivision 4-7.3 and the comment, code comparison, and supplemental Missouri comment thereto of Rule 4 be and the same are hereby repealed and a new subdivision 4-7.1 and a new comment, code comparison and supplemental Missouri comment thereto; a new subdivision 4-7 and a new comment and supplemental Missouri comment thereto; and a new subdivision 4-7.3 and a new comment, code comparison, and supplemental Missouri comment thereto adopted in lieu thereof to read as follows:

4-7.1 COMMUNICATION CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services.

A communication is false if it contains a material misrepresentation of fact or law.

A communication is misleading if it:

(a) omits a fact as a result of which the statement considered as a whole is materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve;

(c) proclaims results obtained on behalf of clients, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts or settlements, without stating that past results afford no guarantee of future results and that every case is different and must be judged on its own merits;

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(f) advertises for a specific type of case concerning which the lawyer has neither experience nor competence;
(g) indicates an area of practice in which the lawyer routinely refers matters to other lawyers, without conspicuous identification of such fact;
(h) contains any paid testimonial about or endorsement of the lawyer, without conspicuous identification of the fact that payment has been made for the testimonial or endorsement;
(i) contains any simulated portrayal of a lawyer, client, victim, scene, or event without conspicuous identification of the fact that it is a simulation;
(j) provides an office address for an office staffed only part-time or by appointment only, without conspicuous identification of such fact; or
(k) states that legal services are available on a contingent or no-recovery-no-fee basis without stating conspicuously that the client may be responsible for costs or expenses, if that is the case.

COMMENT

This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful.

CODE COMPARISON

DR 2-101 provides that "a lawyer shall not . . . use . . . any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim." DR 2-101(B) provides that a lawyer "may publish or broadcast . . . the following information . . . in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information . . . complies with DR 2-101(A), and is presented in a dignified manner. . . ." DR 2-101(B) then specifies 25 categories of information that may be disseminated. DR 2-101(C) provides that "any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to (the agency having jurisdiction under state law). . . . The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers."

SUPPLEMENTAL MISSOURI COMMENT

This Rule 4-7.1 is not intended to alter the definition of "competence" as defined in Rule 4-1.1.

Rule 4-7.1 prohibits false or misleading communications. False and misleading statements have never enjoyed the limited first amendment protection afforded to other forms of commercial speech by *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and its progeny.

Rule 4-7.1(c) allows a verifiable statement regarding the number of cases tried or handled in a particular area without the disclaimer language of Rule 4-7.1(c).

Rule 4-7.1(h) addresses the practice of using testimonials and endorsements by entertainers, sports figures or other well-known persons. This rule requires the disclosure of the fact that a payment was made to obtain the testimony or endorsement, thereby giving the public an opportunity to evaluate the credibility of the statement.

Rule 4-7.1(i) deals with simulations primarily utilized in the electronic media. Rule 4-7.1(i) permits simulations of a lawyer, client, victim, scene or event if the advertising indicates that it is a simulation that is being portrayed. The simulation must contain a disclosure that it is a simulation in order to counteract any suggestion that the representation is a portrayal of actual fact. Rule 4-7.1(i) also permits a communication to contain a picture or other representation of the lawyer or lawyers providing the legal services that are the subject of the advertisement.

4-7.2 ADVERTISING

(a) Subject to the requirements of Rule 4-7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio, or television, or through direct mail advertising distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter.
(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. The record shall include the name of at least one lawyer responsible for its content unless the advertisement or written communication itself contains the name of at least one lawyer responsible for its content.
(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that:
(1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule 4-7.2;
(2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by Rule 4-1.17; and
(3) a lawyer may pay the usual charges of a qualified lawyer referral service registered under Rule 4-10.1 or other not-for-profit legal services organization.
(d) A lawyer may not, directly or indirectly, pay all or a part of the cost of an advertisement in the public media unless such advertisement discloses the name and address of the financing lawyer, the relationship between the advertising lawyer and the financing lawyer, and whether the advertising lawyer is likely to refer cases received through the advertisement to the financing lawyer.
Similarly, in any communications such as television, radio or other electronic programs purporting to give the public legal advice or legal information, for which programs the broadcaster receives any remuneration or other consideration, directly or indirectly, from the lawyer who appears on those programs, the lawyer shall conspicuously disclose to the public the fact that the broadcaster has been paid or receives consideration from the lawyer appearing on the program.
(e) A lawyer or law firm shall not advertise the existence of any office other than the principal office unless:
(1) that other office is staffed by a lawyer at least three days a week, or
(2) the advertisement states:
(A) the days and times during which a lawyer will be present at that office, or
(B) that meetings with lawyers will be by appointment only.
(f) Any advertisement or communication made pursuant to this Rule 4-7.2, other than written solicitations governed by the disclosure rules of Rule 4-7.3(b), shall contain the following conspicuous disclosure:
"The choice of a lawyer is an important decision and should not be based solely upon advertisements."
(g) The disclosures required by Rules 4-7.2(e) and (f) need not be made if the information communicated is limited to the following:
(1) the name of the law firm and the names of lawyers in the firm;
(2) one or more fields of law in which the lawyer or law firm practices;
(3) the date and place of admission to the bar of state and federal courts; and
(4) the address, including e-mail and web site address, telephone number, and office hours.

COMMENT

To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

Paying Others to Recommend a Lawyer. A lawyer is allowed to pay for advertising permitted by this Rule 7.2, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Rule 7.2(c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule. Rule 7.2(c) also does not prohibit paying a person for making a testimonial or endorsement in compliance with Rule 7.1(h).

SUPPLEMENTAL MISSOURI COMMENT

Advertising concerning a lawyer's services should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of appropriate counsel. Information communicated in advertising should be disseminated in an objective and understandable fashion and should be relevant to a prospective client's ability to choose a lawyer. A lawyer should strive to communicate such information without undue emphasis upon advertising stratagems, which serve to hinder rather than to facilitate intelligent selection of counsel. Tasteful advertising is a matter of subjective interpretation. However, in all communications concerning a lawyer's services, a lawyer should avoid advertising that serves to denigrate the dignity of the profession or trust in courts, of which every lawyer functions as an officer.

Rules 4-7.2(d) and (e) have been added to jointly address the problem of advertising that experience has shown misleads the public concerning the location where services will be provided or the lawyer who will be performing these services. Together they prohibit the same sort of "bait and switch" advertising tactics by lawyers that are universally condemned.

Rule 4-7.2(e) also prohibits advertising the availability of a satellite office that is not staffed by a lawyer at least on a part-time basis. The rule does not require, however, that a lawyer or firm identify the particular office as its principal one. Experience has shown that, in the absence of such regulation, members of the public have been misled into employing a lawyer in a distant city who advertises that there is a nearby satellite office, only to learn later that the lawyer is rarely available to the client because the nearby office is seldom open or is staffed only by lay personnel.

Rule 4-7.2(e) is not intended to restrict the ability of legal services programs to advertise satellite offices in remote parts of the program's service area even if those satellite offices are staffed irregularly by attorneys. Otherwise, low-income individuals in and near such communities might be denied access to the only legal services truly available to them.

When a lawyer or firm advertises, the public has a right to expect that lawyer or firm will perform the legal services. Experience has shown that lawyers not in the same firm may create a relationship wherein one will finance advertising for the other in return for referrals. Nondisclosure of such a referral relationship is misleading to the public. Accordingly, Rule 4-7.2(d) prohibits such a relationship between an advertising lawyer and a lawyer who finances the advertising unless the advertisement discloses the nature of the financial relationship between the two lawyers. Rule 4-7.2(d) also requires disclosure if a broadcaster receives remuneration from a lawyer appearing on any television, radio or other electronic program purporting to give the public legal advice.

In the case of television, the disclosure required by Rule 4-7.2(f) may be made orally or in writing. In the case of radio, the disclosure must be made orally. The disclosure required by Rule 4-7.2(f) may, at the option of the advertiser, include the following language: "This

disclosure is required by rule of the Supreme Court of Missouri." This disclosure is only required for advertisements in Missouri.

4-7.3 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

This Rule 4-7.3 applies to in-person and written solicitations by a lawyer with persons known to need legal services of the kind provided by the lawyer in a particular matter for the purpose of obtaining professional employment.

(a) In-person solicitation. A lawyer may not initiate the in-person, telephone or real time electronic solicitation of legal business under any circumstance, other than with an existing or former client, lawyer, close friend or relative.

(b) Written Solicitation. A lawyer may initiate written solicitations to an existing or former client, lawyer, friend or relative without complying with the requirements of this Rule 4-7.3(b). Written solicitations to others are subject to the following requirements:

(1) any written solicitation by mail shall be plainly marked "ADVERTISEMENT" on the face of the envelope and all written solicitations shall be plainly marked "ADVERTISEMENT" at the top of the first page in type at least as large as the largest written type used in the written solicitation;

(2) the lawyer shall retain a copy of each such written solicitation for two years. If written identical solicitations are sent to two or more prospective clients, the lawyer may comply with this requirement by retaining a single copy together with a list of the names and addresses of persons to whom the written solicitation was sent;

(3) each written solicitation must include the following:

"Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri;"

(4) written solicitations mailed to prospective clients shall be sent only by regular United States mail, not registered mail or other forms of restricted or certified delivery;

(5) written solicitations mailed to prospective clients shall not be made to resemble legal pleadings or other legal documents;

(6) any written solicitation prompted by a specific occurrence involving or affecting the intended recipient of the solicitation or family member shall disclose how the lawyer obtained the information prompting the solicitation;

(7) a written solicitation seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope or on the outside of a self-mailing brochure or pamphlet the nature of the client's legal problem;

(8) if a lawyer knows that a lawyer other than the lawyer whose name or signature appears on the solicitation will actually handle the case or matter or that the case or matter will be referred to another lawyer or law firm, any written solicitation concerning a specific matter shall include a statement so advising the potential client; and

(9) a lawyer shall not send a written solicitation regarding a specific matter if the lawyer knows or reasonably should know that the person to whom the solicitation is directed is represented by a lawyer in the matter.

(c) A lawyer shall not send, nor knowingly permit to be sent, on behalf of the lawyer, the lawyer's firm, the lawyer's partner, an associate or any other lawyer affiliated with the lawyer or the lawyer's firm, a written solicitation to any prospective client for the purpose of obtaining professional employment if:

(1) it has been made known to the lawyer that the person does not want to receive such solicitations from the lawyer;
(2) the written solicitation involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;
(3) the written solicitation contains a false, fraudulent, misleading, or deceptive statement or claim or makes claims as to the comparative quality of legal services, unless the comparison can be factually substantiated, or asserts opinions about the liability of the defendant or offers assurances of client satisfaction;
(4) the written solicitation concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person solicited or a relative of that person if the accident or disaster occurred less than 30 days prior to the solicitation or if the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person solicited makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or
(5) the written solicitation vilifies, denounces or disparages any other potential party.

COMMENT

There is a potential for abuse inherent in direct in-person, live telephone, or real-time electronic contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the layperson to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who already may feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to prospective client, rather than direct in-person, live telephone, or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to help guard against statements and claims that might constitute false and misleading communications in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic conversations between a lawyer and a prospective client can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

There is far less likelihood that a lawyer would engage in abusive practices against an individual who is a former client, or with whom the lawyer has close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(b) are not applicable in those situations. Also, Rule 7.3(a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to its members or beneficiaries.

But even permitted forms of solicitation can be abused. Thus, any solicitation that contains information that is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(c)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1), is prohibited.

This Rule 7.3 is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement that the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the

same purpose as advertising permitted under Rule 7.2.
The requirement in Rule 7.3(b)(1) that certain communications be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule 7.3.

CODE COMPARISON

DR 2-104(A) provides with certain exceptions that "a lawyer who has given in-person unsolicited advice to a lay person that he should obtain counsel or take legal action shall not accept employment resulting from that advice. . . ." The exceptions include DR 2-104(A)(1), which provides that "a lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provides other exceptions relating, respectively, to employment resulting from public educational programs, recommendations by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

SUPPLEMENTAL MISSOURI COMMENT

Rule 4-7.3(a) is similar to but less restrictive than Iowa Disciplinary Rule DR 2-101 (4). The United States Supreme Court in the case of *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), held that a state could categorically ban all in-person solicitation.
Rules 4-7.3(b)(1) and (2) are from Rule 7.3 of the Rhode Island rules of the court. Rules 4-7.3(b)(9) and (c)(1) and (2) are from Rhode Island Rule 7.3(b)(2)(a), (b) and (c).
Rule 4-7.3(c)(3) is taken in part from suggestions found in *Shapero v. Kentucky Bar Assn.*, 486 U. S. 466 (1988), which condemned written solicitation that unduly emphasized trivial and uninformative facts or that stated that "the liability of the defendants is clear" or that made claims about the quality of legal services.
Rule 4-7.3(c)(4) is taken from South Carolina Appellate Court Rule 7.3(b)(3) and is similar to Florida's 30-day ban on direct mailing of solicitations to personal injury and wrongful death clients. The Florida 30-day moratorium was upheld in *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). The Supreme Court held that the Florida rule did not violate the lawyer's first amendment rights because it served a legitimate state interest in protecting the privacy and sensibilities of accident victims and helped preserve the integrity of the bar and the public's perception of the administration of justice.
Rules 4-7.3(b)(3) to (8) are taken from South Carolina Appellate Court Rule 7.3(c)(2) and (3), except South Carolina Rule 7.3(c)(3)(i) was eliminated.
The requirements of Rule 4-7.3(b) apply to written solicitations disseminated in Missouri.

2. It is ordered that notice of this order be published in the Journal of The Missouri Bar.
3. It is ordered that this order be published in the South Western Reporter.

Day - to - Day

MICHAEL A. WOLFF
Chief Justice

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